

**Duquesne University of the Holy Ghost and Duquesne University Law School Faculty Association, Petitioner. Case 6-RC-8413**

April 30, 1982

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on March 9, 12, and 16, 1979, before Hearing Officer Frank J. Surprenant. Following the hearing, and before briefs were filed, the Supreme Court issued its decision in *N.L.R.B. v. Catholic Bishop of Chicago, et al.*, 440 U.S. 490 (1979). Thereafter, Duquesne University of the Holy Ghost (the University or the Employer) filed a motion to dismiss based on *Catholic Bishop* and asserting that the Board lacks jurisdiction because Congress did not extend coverage of the National Labor Relations Act to teachers in church-operated educational institutions.

Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 6, the case was transferred to the National Labor Relations Board for decision. On July 26, 1979, the Board remanded the case to the Regional Director for the limited purpose of receiving evidence concerning the National Labor Relations Board's jurisdiction over the University in light of *Catholic Bishop*. The Board indicated that at the conclusion of the hearing the case should be transferred to the Board for decision. Thereafter, a hearing was held on August 23 and September 10, 1979, before Hearing Officer Surprenant. On September 10, 1979, the University withdrew its motion to dismiss and indicated that it had no objection to the Board's assertion of jurisdiction in this proceeding. Pursuant to the Board's remand order, the case was transferred to the Board at the end of the supplemental hearing.<sup>1</sup> Thereafter, before issuance of the Board's decision in this proceeding, the Supreme Court issued its decision in *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), in which the Court held that full-time faculty members at *Yeshiva* were managerial employees excluded from coverage of the Act. As the Board determined that the issue raised in *Yeshiva* was also raised in the instant proceeding, on May 30, 1980, the Board issued a notice to the parties of the opportunity to submit statements of position in light of the Supreme Court's decision in *Yeshiva*. Thereafter, the University and Duquesne University

Law School Faculty Association (the Association) submitted statements of position.

The Board has reviewed the Hearing Officer's rulings made at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer, a Pennsylvania nonprofit corporation and a Catholic institution of higher learning, is engaged in the operation of a private university at its sole location in Pittsburgh, Pennsylvania. During the year preceding the initial hearing in this proceeding, a representative period, the Employer received gross revenues in excess of \$1 million from the operation of the University. During the same period, it received supplies and materials valued in excess of \$50,000 at its Pittsburgh, Pennsylvania, facility directly from points located outside the Commonwealth of Pennsylvania.

As noted, the Employer initially urged that the Supreme Court's decision in *Catholic Bishop* precluded the Board's asserting jurisdiction in this proceeding. In *Catholic Bishop*, the Supreme Court held that the Act was not clearly intended "to bring teachers in church-operated schools within the jurisdiction of the Board."<sup>2</sup> However, the Employer no longer contends that *Catholic Bishop* is a bar to the Board's jurisdiction. Further, the Board in *Barber-Scotia College, Inc.*,<sup>3</sup> indicated its view that the Supreme Court's holding in *Catholic Bishop* applied only to parochial elementary and secondary schools. Accordingly, we conclude that we are not precluded from asserting jurisdiction here and we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction here.

2. The Duquesne University Law School Faculty Association is not a labor organization within the meaning of Section 2(5) of the Act.<sup>4</sup>

3. A question affecting commerce does not exist within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

Petitioner seeks to represent a unit of all full-time faculty of the Duquesne University School of Law, including the head law school librarian, and excluding all part-time faculty, the dean, the assistant dean, assistants to the dean, all other employees who may be employed by Duquesne University

<sup>2</sup> 440 U.S. 490.

<sup>3</sup> 245 NLRB 406 (1979).

<sup>4</sup> In light of our finding, *infra*, that the faculty members seeking representation are managerial employees and since it appears that Petitioner is comprised solely of the managerial employees involved herein, we find that Petitioner does not represent statutory employees and therefore is not a labor organization within the meaning of the Act.

<sup>1</sup> On September 17, 1979, the Employer filed a motion to reopen the record to submit an affidavit into evidence concerning various proposed inclusions and exclusions to any unit found appropriate here. In light of our disposition of this case, it is unnecessary to rule on that motion.

School of the Holy Ghost and its law school, and all guards and supervisors as defined in the Act. In its statement of position on the issue considered by the Supreme Court in *Yeshiva*, Petitioner contends that when the record is viewed in its entirety it is clear that full-time faculty at the law school are employees rather than managerial and/or supervisory employees because "positions of the faculty as a whole on issues are accepted only when it so suits the University Administration, including the Dean of the law school." The University, however, contends that, based on the Supreme Court's decision in *Yeshiva*, its full-time law school faculty members are managerial employees and, as such, are not covered by the National Labor Relations Act. As set forth below, we find that the record supports the University's contentions and, accordingly, we dismiss the petition.

The University's School of Law is accredited by the American Bar Association and is a member of the Association of American Law Schools. The law school's chief executive officer is its dean, who is also an instructor in the law school. The law school's faculty is comprised of 14 full-time members and approximately 24 adjunct professors. There are no departments or department chairpersons.

In *Yeshiva*, the Supreme Court found that the faculty effectively determined the curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. The Court noted that the faculty's power at *Yeshiva* extended beyond strictly academic concerns. Thus the faculty also made recommendations to the dean concerning hiring, tenure, sabbaticals, terminations, and promotions. Although final decisions were made by the central administration on advice of the dean, the Court noted that an overwhelming majority of faculty recommendations were followed. Based on these findings, the Court held that the faculty members at *Yeshiva* exercised managerial functions and were, therefore, excluded from the Act's coverage.

As in *Yeshiva*, the law school faculty at Duquesne exercises significant authority over the law school's curriculum. It determines the requirements for each class, whether the classes are to be required or elective, and any changes in the curriculum of individual classes. The faculty also established the law school's current grading system. Although the dean can "pocket-veto" faculty recommendations, there is no evidence that he has done so. Furthermore, the school's bylaws require that the Dean "obtain the consensus of the faculty on academic matters." The bylaws further provide that faculty members shall enjoy full academic

freedom in the classroom, and faculty members, in fact, have complete freedom with respect to classroom matters such as grading and course content. The faculty in *Yeshiva* exercised similar control.

The Duquesne law school faculty, like the faculty in *Yeshiva*, effectively controls admission and matriculation standards. It determines admission requirements, including grade point average and LSAT scores necessary for admission. The faculty also determines the levels of competence necessary for students to remain in school and, in accordance with necessary accreditation guidelines, the number of credits necessary for graduation. The faculty established a joint degree program and set the graduation requirements for that degree. The faculty has voted to reduce or increase class size and the administration has usually adhered to these recommendations.

As noted, in *Yeshiva*, the faculty's authority extended beyond strictly academic concerns. Here, the faculty also exercises considerable authority outside of the academic sphere. As in *Yeshiva*, the law school faculty exercises significant control in the areas of hiring and tenure. While part-time faculty members are hired by the dean without conferring with the faculty, full-time faculty members are initially screened by the recruitment committee, which consists of the dean and two tenured faculty members. Candidates are then brought to the University and interviewed by tenured faculty members. The tenured faculty then votes and recommends that a candidate be hired or rejected. If the faculty recommends that a candidate be hired, the dean then negotiates with the candidate concerning such matters as salary and rank. The dean has no authority to hire a candidate against the faculty's recommendation. In fact, the dean has never attempted to fill a full-time position following a negative faculty vote and on only one occasion has he refused to allow the faculty to vote on an individual whom he deemed unfit. The faculty, however, can veto any hiring decision made by the dean. Finally, tenured faculty members effectively recommend the awarding of tenure. This is done by a vote of the tenured members of the faculty.

The faculty in *Yeshiva* could make effective recommendations to the dean concerning terminations. Here, the faculty does not have this authority. Thus, despite faculty votes to the contrary, several faculty members have received notices of termination and the dean was reinstated for a second 5-year term despite a negative faculty vote. Moreover, if a faculty member is terminated and appeals, the faculty has no role in the appellate process. Although the authority of the Duquesne Law School faculty with respect to the termination of

teachers is less than that exercised by the Yeshiva faculty, we do not find this determinative, given the similar authority exercised in other areas as outlined previously.

In sum, it is evident from the record that the managerial authority possessed by the Duquesne law school faculty is nearly identical to that possessed by the faculty in *Yeshiva* in such critical academic matters as curriculum, grading systems, and admission and matriculation standards. Further, as

in *Yeshiva*, the faculty here exercises its authority in nonacademic matters, including decisions concerning hiring and tenure. In view of all the foregoing, we find that the full-time faculty members sought by Petitioner are managerial employees. Accordingly, we shall dismiss the petition.

#### ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.